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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBBY ALAN BEASLEY, Defendant and Appellant.	A137587 (Lake County Super. Ct. No. CR925157A)

A jury found defendant Robby Alan Beasley guilty of one count of being a past-convicted felon in possession of a firearm (Pen. Code, former § 12021, subd. (a), currently § 29800, subd. (a)), and two counts of first degree murder with the special circumstance of multiple murders (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3)). The jury also found true enhancement allegations that each of the murders involved the personal use of a firearm and the personal infliction of great bodily injury. Following receipt of the verdicts, defendant was sentenced to state prison for terms prescribed by law. He contends his convictions are infected with the constitutionally incompetent performance of his trial counsel and instructional error. We conclude these contentions are without merit, and affirm.

BACKGROUND

The salient events are fairly straightforward. Viewed most favorably to the prosecution (*People v. Maury* (2003) 30 Cal.4th 342, 403), the trial record shows the following.

Defendant made his living from the sale of marijuana illegally cultivated in his apartment, and from working for another grower, Elijah McKay. Defendant widely voiced his suspicion (which was correct) that two acquaintances, Frank and Yvette Maddox, broke into his apartment and stole a considerable amount (approximately $10,000 worth) of marijuana. Retribution was threatened. McKay provided a gun so that defendant could protect the marijuana plants in his apartment.[1] McKay did not believe defendant when he vowed to kill the Maddoxes and bury their bodies in a grave he had already dug if they did not admit to the theft.[2] McKay declined defendant's offer to do the job himself for $20,000.

On the afternoon of January 22, 2010, at defendant's request, McKay picked him up at a private rural road. An agitated defendant informed McKay that " 'I killed the Maddoxes,' " but he had not buried their bodies. McKay helped defendant destroy the clothing he was wearing. The next day, McKay helped defendant move the Maddoxes truck to an even more isolated location. He also told McKay what had happened.

McKay testified that, according to defendant, he concocted a ruse whereby the Maddoxes had agreed to drive him to the airport. Defendant and Frank Maddox stopped the truck and got out to relieve themselves. Defendant produced a cocked handgun and pulled Yvette Maddox from the truck. "He said he fired a round or two into the ground

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[1] Defendant and McKay grew up together in Maine. It was McKay who suggested defendant come to California and assist in McKay's marijuana growing operation. Although the details are not entirely clear, it appears McKay had been charged with complicity in the murders and was testifying pursuant to an immunity agreement with the prosecutor, possibly to avoid criminal charges against his girlfriend and son. McKay had his own counsel, who was present during his testimony. The jury was instructed that McKay was in effect an accomplice as a matter of law, and thus his testimony required corroboration if it was to serve as the basis for convicting defendant.

[2] McKay had had his own problems with the Maddoxes. They had worked for him until an altercation with Frank led to McKay firing them. It was defendant who brought the Maddoxes out from Maine. After McKay fired them, the Maddoxes had stayed briefly in defendant's apartment, until he kicked them out for their fighting and drug use. The burglary of defendant's apartment occurred shortly thereafter, raising the inference that it was a vindictive response by the Maddoxes.

by their feet," but "[t]hey still wouldn't talk." Defendant then shot Frank Maddox in the leg. After Frank warned "You better kill me, or I'll kill you," defendant "said he shot Frank in the head," and "shot Yvette in the head also." Defendant was in the process of dragging "them both down the hill" when "he realized they were still alive, so he shot them both in the head again." It was at this point that he had called McKay for a ride the day before.

McKay was uneasy because the bodies remained exposed, and uncomfortably near his home. When he asked defendant to either move the bodies or bury them, defendant refused. But defendant offered McKay "twenty grand" if he would bury them. When McKay responded " 'There was no way in hell I was going to put my footprints by some murder site,' " defendant said "[t]hat he didn't want to go back there either." Defendant told McKay that the gun he used to kill the Maddoxes would never be found.[3]

More than a month went by before the largely decomposed bodies of Frank and Yvette Maddox were discovered.[4] That of Yvette Maddox had two gunshot wounds to the head. The body of Frank Maddox also had a gunshot wound to the leg, as well as the two in his head.

Defendant's former girlfriend testified that when she visited him in jail defendant "just showed me his hand. It said, 'Did they find the gun.' "

The defense was directed at the credibility of Emily Dispennette and Adam Alcorn, who lived together for a while in the same building where defendant and the

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[3] The actual murder weapon was not produced at the trial.

[4] The chronology is a bit unclear, but it appears that following the shootings McKay shipped his remaining stock of processed marijuana to Atlanta. However, according to McKay, the person in Georgia with whom he was dealing "stole . . . it [the marijuana] after he wore a wire on me and had the cops arrest me." While in police custody, McKay told Atlanta police that he "might have information about a homicide." Lake County Sheriffs deputies flew to Atlanta and spoke with McKay, who agreed to cooperate. (See fn. 1, *ante*.) After the bodies had been discovered, a search of defendant's premises (including his apartment) led to his arrest for cultivating marijuana. McKay's premises were also searched, and what was found there led to his arrest for cultivation.

Maddoxes had apartments, and who were involved in the marijuana cultivation scene. Both Dispennette and Alcorn had testified in the prosecution's case-in-chief.

The prosecutor's direct examination of Dispennette began with him establishing that "At some point . . . the Lake County District Attorney's Office [was] prosecuting a case against you and Adam Alcorn for marijuana cultivation"; that "I dismissed it"; and that there was no "kind of a deal as far as the dismissal with you as far as testimony or anything like that." Dispennette then testified that she knew defendant, and had lived in the apartment building with Alcorn. Next, that "[a] couple of weeks before Yvette and Frank [Maddox] disappeared" defendant told her "he wanted them to leave town and that he was trying to get them to leave town" and "if they weren't going to leave town, then they would come up missing," that he wanted to "get rid of them," and that "harm was going to befall them in one way or another" if they did not leave. In a subsequent conversation, defendant told Dispennette "he was going to physically harm them or kill them if they wouldn't leave." "He . . . said that . . . he had thought that they had stolen from him and that he wanted them out of his life." Defendant cross-examined her at considerable length.

Alcorn testified only after—out of the jury's hearing and with the assistance of counsel—invoking his right against self-incrimination and being given a grant of immunity for his testimony. The prosecutor's preliminary questions involved Alcorn's "relationship" with Dispennette; the criminal charges that were dismissed with "no agreement, no bargains"; that he was testifying under immunity; that while living at the apartment he was growing marijuana; and that he knew defendant and the Maddoxes. Alcorn then testified to the theft of marijuana from defendant's apartment, and defendant's statements that he believed the Maddoxes were responsible, "he didn't want them anywhere around there," and "they were . . . supposed to be leaving town and be gone." Defendant's cross-examination was about as long as the direct examination.

The defense commenced with brief testimony from Detectives Drewrey and Andrews, both of whom had testified in the prosecution's case-in-chief. Drewrey testified about McKay's cell phone records, and the initial interviews with Dispennette in

the county jail, when she was uncooperative, and vague as to matters which had been clarified by the time she testified for the prosecution. Andrews testified that Dispennette initially wanted "some sort of guarantee that she and her boyfriend Adam Alcorn would be released from custody." McKay testified about his cell phone records, and the details of when he received defendant's phone call request for the ride during which McKay first heard defendant mention the murders.

The sole new defense witness was Sheriff's Detective Frank Walsh, who testified about what was discovered during the course of a warrant-authorized search of the Dispennette-Alcorn apartment, and that Walsh then "arrested Adam Alcorn and Emily Dispennette for cultivation of marijuana and possession of marijuana for sale."

DISCUSSION

Defendant's Trial Counsel Was Not Ineffective For Not Objecting To Expert Testimony

Deputy Sheriff James Dunlap testified that while in jail, defendant wrote "Elijah McKay is a rat, punk, bitch, snitch. New England" on the wall of his cell. One of the jail personnel testified that "[a] large number of cells throughout the facility where Beasley has been kept have 'New England' scratched . . . or written somewhere in the cell." Deputy Dunlap was then asked some follow-up questions:

"Q. With regard—would it be fair to say that certain words have a different context within the jail context than they might out in the general population or the general public?

"A. Yes.

"Q. With regard to the term 'snitch' in the context of the jail environment or custodial environment, what is your understanding, based upon your however many years working in that environment, or the meaning of the term 'snitch'?

"A. A snitch is someone who tells authorities such as cops information regarding someone else's case or information.

"Q. And how about rat?

"A. Same."

The jury heard this testimony only after the court had heard it out of the jury's presence in order to rule on defendant's objection to the admissibility of the specific words on the cell wall. Defense counsel objected that it had not been proven that defendant had the exclusive access to the cell wall and thus was the author. A second objection was that the evidence ought to be excluded under Evidence Code section 352. On this point defense counsel argued:

"Why do I think this is substantially more prejudicial than it is probative? Because of the following: Everyone knows by this point that Mr. McKay is turning State's evidence, so to speak. You can call that snitch or rat, or you can call it turning state's evidence. But the person who scratched the graffiti can't be compelled to testify if it's Mr. Beasley, and isn't here if it's someone else. So we can't have the exact meaning necessarily. So I think we need to analyze it in that light. Should it be allowed in? Do the People have a sufficient connection up to the Court? They certainly have evidence that suggests that Mr. Beasley scratched it, but it's up to the Court to decide that. I'll leave it to the Court.

"When it comes to this language, it's highly offensive. It could distract the jury from the jury's principal duty here, which is to decide whether McKay has been telling the truth or not and whether Beasley has been proven guilty or not. My concern here is just anger between the two of these men is not in itself good enough to overcome the prejudicial effect of the very nastiness of the words used. Some of these words are extremely offensive. I mean, there are other foul words that we could use that would really, you know, make everyone sit up straight and go, oh, my gosh, I can't believe you said that in court. Punk is such a word in jail. It just doesn't happen to be in court unless you happen to be someone who's in jail also. I think that the prejudicial effect of this far outweighs the probative value. There's no big surprise that Mr. Beasley would have negative feelings towards Mr. McKay. I mean, come on. So really, what is the probative value here? It's just about nil. It just shows maybe, if it's believed, it would show that

my client was willing to, you know, vandalize a wall that's been scratched before probably at the jail. Submitted."

The court declined to exclude the evidence, but it did offer to redact the statement to eliminate the words "punk" and "bitch." Defendant declined the offer. Defense counsel told the court: "No redaction necessary. Thank you. I've discussed it with my client. We decided we'll leave it in."

Defendant contends, to quote the caption of his opening brief, "defense counsel provided ineffective assistance, in violation of the Sixth Amendment, by permitting the prosecutor to elicit testimony that the word *snitch* means the cooperating witness's information is true." This contention is to be evaluated according to well established principles.

" 'The law governing defendant's claim is settled. "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.' " [Citations.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant's burden as follows: " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed:

" 'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.' " [Citation.]' [Citation.] If the record on appeal ' " 'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected," ' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.'[5] [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

Defendant does not satisfy these criteria. The obvious difficulty is that trial counsel *did* try to have the snitch evidence excluded. If defendant is now complaining that counsel did not repeat that unsuccessful effort in front of the jury, the claim fails because "Counsel is not required to proffer futile objections." (*People v. Anderson* (2001) 25 Cal.4th 543, 587.) Defendant now has new theories on which the evidence might have been excluded, but this second-guessing does not establish that trial counsel was ineffective. Our Supreme Court has repeatedly emphasized that a trial counsel's decision " 'whether to object is inherently tactical' " (*People v. Harris* (2008) 43 Cal.4th 1269, 1290), and "because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v. Maury, supra,* 30 Cal.4th at pp. 415-416.) Just because defendant can now conceive of new grounds to object does not establish incompetence. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson, supra,* 25 Cal.4th at p. 569.) A reasonably competent counsel could make the tactical decision to advance only one

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[5] During the pendency of this appeal, defendant's appellate counsel also filed petitions for habeas corpus relief in both this court and the trial court. Both petitions are also based on trial counsel's alleged ineffectiveness. We dispose of the habeas petition (A142207) by separate order filed this day.

ground (presumably the one thought most likely to succeed), rather than fling up a barrage of objections. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531 ["Failure to argue an alternative theory is not objectively unreasonable as a matter of law."].) "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. [Citation.] . . . The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

There Was No Instructional Error

The jury was instructed on the principal charges of murder as follows:

"The defendant is charged in Counts One and Two with murder, in violation of Penal Code section 187(a). To prove that the defendant is guilty of this crime, the People must prove that, one the defendant committed an act that caused the death of another person; two, when the defendant acted, he had a state of mind called malice aforethought; and three, he killed without lawful justification.

"There are two kinds of malice aforethought: express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if he unlawfully intended to kill. The defendant acted with implied malice if, one, he intentionally committed an act; two, the natural and probable consequence of the act were dangerous to human life; three, at the time he acted, he knew his act was dangerous to human life; and four, he deliberately acted with conscious disregard for human life. Malice aforethought does not require hatred or ill will towards the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. If you decide that the defendant committed murder, then you must decide whether it is murder of the first or second degree." (CALCRIM No. 520.)

"The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. . . .

"The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this

burden, you must find the defendant not guilty of first-degree murder." (CALCRIM No. 521.)

"Provocation may reduce a murder from first-degree to second-degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second-degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." (CALCRIM No. 522.)

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. The defendant killed someone because of a sudden quarrel or in the heat of passion if, one the defendant was provoked; two, as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and three, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation . . . may occur over a short or long period of time. It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the

People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 570.)

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on the defendant's belief and the need to use deadly force was reasonable. The defendant acted in imperfect self-defense if, one, the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; and two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger. But, three, at least one of those beliefs was unreasonable. Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 571.)

"The defendant is not guilty of murder or voluntary manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if, one, the defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and three, the defendant used no more force than was reasonably necessary to defend against that danger. Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. The defendant must have believed there was an imminent danger of death or great bodily injury to himself. The defendant's belief must have been reasonable, and he must have acted only because of that belief. The defendant is only entitled to use that amount

of force that a reasonable person . . . would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. The defendant's beliefs that he was threatened may be reasonable if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

"A defendant is not required to retreat. He or she is entitled to stand his ground and to defend himself and if reasonably necessary to pursue an assailant until the danger of death or great bodily injury has past [sic]. This is so even if safety could have been achieved by retreating.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or voluntary manslaughter." (CALCRIM No. 505.)

Defendant contends there were two defects in these instructions.

He first contends, and again we quote the caption in his opening brief: "The trial court violated appellant's fourteenth amendment due process rights by failing to clarify that imperfect self-defense which is insufficient to reduce murder to manslaughter may still be sufficient to reduce the murder from first to second [degree]." A trial court is under the independent obligation to see that the jury is instructed on " 'the general principles of law governing the case,' " but the court "has no duty to so instruct on doctrines of law that have not been established by authority." (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) Defendant's contention comes within this rule because it advocates the existence of a logical absurdity. The premise of imperfect self-defense in homicide cases is that " 'the defendant is deemed to have acted without malice and thus

can be convicted of no crime greater than voluntary manslaughter.' " (*Id.* at p. 529; see 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 82, p. 523.) Defendant is asking for a theory of imperfect self-defense that does *not* negate malice, and does *not* reduce the offense to manslaughter, but only reduces the offense from first to second-degree.[6] It is no surprise that this theory has "not been established by authority," which means the trial court cannot be faulted for not instructing the jury on such a theory.[7]

The second defect defendant identifies is that "the trial court violated appellant's fourteenth amendment due process rights by failing to instruct that, in order to reduce first degree murder to second degree murder, the provocation need not be sufficient to cause a person of average disposition to act rashly." Defendant reasons that "while CALCRIM No. 522 tells jurors that '[p]rovocation may reduce murder from first degree to second degree,' it offers no clue about the circumstances in which that can happen. Because of this omission, the jurors had no way to know that even provocation which would not cause an ordinary, reasonable person to act rashly may still bear on the degree of murder." But it did—CALCRIM No. 522 told the jury that "[t]he weight and significance of the provocation . . . are for you to decide," for the jury to "consider . . . in deciding whether the defendant committed murder or manslaughter," and for the jury to "consider . . . in deciding whether the crime was first or second-degree murder." The

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[6] Defendant's contention would also appear to entail a reworking of the law of self-defense: "Appellant . . . is arguing that the jury could reasonably have found that he killed the Maddoxes out of an honest but unreasonable belief in the need for self-defense. Because the perceived danger was not imminent, however, appellant's honest but unreasonable belief lacked an essential ingredient for imperfect self-defense negating malice. But just as voluntary intoxication and mental illness may still be used to show the absence of a particular mental state, so should imperfect self-defense be available to negate the element of premeditation and deliberation—even if the facts giving rise to that imperfect self-defense claim are legally inadequate to negate malice." Thus, the law would have to recognize a new type of non-imminent peril self-defense that would reduce first-degree murder to second-degree.

[7] Nor can blame be attributed to defendant's trial attorney, because reasonably competent counsel could certainly make a rational tactical decision not to ask for instruction on an unrecognized defense. Defendant's appellate counsel candidly advises he "found no case which has directly addressed" the point he now advances.

instruction has been upheld as correct. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1001; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334.)

The discussion in *People v. Hernandez*, *supra*, 183 Cal.App.4th at page 1334 is apt: "Although CALCRIM No. 522 does not expressly state provocation is relevant to the issues of premeditation and deliberation, when the instructions are read as a whole there is no reasonable likelihood the jury did not understand this concept. Based on CALCRIM No. 521, the jury was instructed that unless the defendant acted with premeditation and deliberation, he is guilty of second, not first, degree murder, and that a rash, impulsive decision to kill is not deliberate and premeditated. Based on CALCRIM No. 522, the jury was instructed that provocation may reduce the murder to second degree murder. [¶] In this context, provocation was not used in a technical sense peculiar to the law, and we assume the jurors were aware of the common meaning of the term. [Citation.] Provocation means 'something that provokes, arouses, or stimulates'; provoke means 'to arouse to a feeling or action[;]' . . . 'to incite to anger.' [Citations.] Considering CALCRIM Nos. 521 and 522 together, the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation."

Defendant argues that *Hernandez* is distinguishable because "the jury in *Hernandez* received no instruction on voluntary manslaughter," but here the jury was instructed with CALCRIM No. 570, and CALCRIM No. 522 "did not clarify that the objective ('person of average disposition') standard set forth in CALCRIM No. 570's voluntary manslaughter instruction had no relevancy in assessing appellant's guilt of heat of passion second degree murder." However, as *Hernandez*, points out, CALCRIM No. 521 did tie "a rash, impulsive decision to kill" to murder. (*People v. Hernandez*, *supra*, 183 Cal.App.4th at p. 1334.)

DISPOSITION

The judgment of conviction is affirmed.

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Miller, J.

We concur:

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Richman, Acting P. J.

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Stewart, J.

A137587, *People v. Beasley*